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In the Supreme Court of the United States

OCTOBER TERM 1959

No. 768

JACK T. HELM, NORBERT J. ABEL, KARL F. ABEL and L. C. WILKIRSON, co-partners doing business as Transportation Services, Inc.,
Appellants,

vs.

STATE OF ARIZONA, ex rel.
Robert Morrison, Attorney General,
Appellee.

Motion to Dismiss the Appeal

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Motion to Dismiss

The State of Arizona, appellee herein, hereby moves this Court to make and enter its order dismissing the appeal of Jack T. Helm, Norbert J. Abel, Karl F. Abel and L. C. Wilkirson, co-partners doing business as Transportation Services, Inc., appellants, (1) upon the ground that the appeal is not within the jurisdiction of this court because not taken in conformity to the Rules of the Supreme Court of the United States, and (2) upon the further

ground that the federal question sought to be reviewed was not timely or properly raised by the appellants in the court below, and (3) upon the further ground that the question sought to be reviewed is not a substantial federal question.

NON-COMPLIANCE WITH SUPREME COURT RULES

Pursuant to rule 16 (1)(a) of the Rules of the Supreme Court, the appellee moves to dismiss the appeal on the ground that the appeal is not taken in conformity to the Supreme Court rules. Rule 15 of the Supreme Court Rules sets out in detail the nature of the jurisdictional statement required by paragraph 2 of rule 13. The jurisdictional statement filed by the appellants does not conform with rule 15 in the following respects:

1. The jurisdictional statement does not contain the date the notice of appeal was filed. Rule 15(1)(b)(ii).

2. The jurisdictional statement does not cite cases sustaining the basis on which the jurisdiction of this court is invoked. Rule 15(1)(b)(iv).

3. The jurisdictional statement, although it sets out the text of the statute involved in the appeal, does not cite the volume and page where it may be found in the official edition. Rule 15(1)(b)(v).

4. The statement of the case contained in the jurisdictional statement does not specify the time at which and the manner in which the federal question sought to be reviewed was raised in the state courts, the method of raising it, and the way in which it was passed upon by the state courts. Rule 15 (1)(d).

THE FEDERAL QUESTION WAS NOT TIMELY OR PROPERLY RAISED

It is well settled that a federal question cannot be raised for the first time by a petition for a rehearing after judgment in the highest court of the state, so as to bring the case within the appellate jurisdiction of the United States Supreme Court, unless the state court passes on the federal ground relied on. *Bushnell*

v. Crooke Mining & Smelting Co., 148 U. S. 682; *Godchaux Co. v. Estopinal*, 251 U. S. 179; *Citizens' National Bank of Cincinnatti v. Durr*, 257 U. S. 99; *Rooker v. Fidelity Trust Co.*, 261 U. S. 114.

In the case at bar, the federal question was not raised in the Arizona Supreme Court until after judgment. In brief, the chronology in the Arizona Supreme Court is as follows:

On February 4, 1959, the State of Arizona filed in the Arizona Supreme Court a motion to dismiss the complaint and vacate the trial court's judgment. On February 24, 1959 the Arizona Supreme Court granted this motion. On February 27, 1959 the appellants herein filed with the Arizona Supreme Court a motion to vacate the order granting the motion to dismiss, and attached a memorandum of authorities. *No mention of any federal question was made in this memorandum.*

On March 31, 1959 the Arizona Supreme Court granted the motion of February 27, 1959, and reinstated the appeal. On April 9, 1959 the State of Arizona filed a motion for reconsideration of the order of March 31, 1959. On April 21, 1959, the appellants herein filed objections to the motion for reconsideration. *The memorandum of authorities attached thereto did not raise any federal question.*

On October 21, 1959, the Arizona Supreme Court rendered its decision, granting the State of Arizona's motion to dismiss the condemnation proceedings and vacate the judgment of the trial court.

On November 5, 1959, appellants herein filed with the Arizona Supreme Court a petition for rehearing, and at pages 3 and 4 of the petition for rehearing contended that application of the provisions of Arizona Revised Statutes §12-1126 to a leasehold interest after the State's acquisition of the underlying fee title to the property impairs a vested right under the Fourteenth Amendment to the Federal Constitution. *This is the first mention in the state courts of any federal question.*

On November 24, 1959, the Arizona State Supreme Court

entered its order denying the petition for rehearing, without any opinion.

This case is unusual, in that the controversy here involved was initiated after the case was lodged in the Arizona Supreme Court. Appellants complain of a violation of their federal constitutional rights by reason of the Arizona Supreme Court's granting the State's motion to dismiss and abandon the proceedings. Under the circumstances, the only manner in which appellants could raise a federal question was by setting it out in one of their memoranda, filed February 27, 1959 and April 21, 1959. These memoranda presented the legal grounds on which appellants resisted the State's motion to dismiss, and nowhere in these memoranda is a mention of a federal constitutional right. Therefore, the State Supreme Court in rendering its decision did not have a federal question before it.

Then, after the Arizona Supreme Court ruled against them, appellants suddenly discovered that there might be a federal question, and included in their motion for rehearing a few lines about the Fourteenth Amendment to the Constitution. However, under the authorities cited above, this is too late. Inasmuch as the Arizona Supreme Court denied the petition for rehearing without passing on any of the grounds alleged therein, appellants have failed to raise a federal question on time, and therefore this Court has no jurisdiction over the appeal.

THE FEDERAL QUESTION IS NOT SUBSTANTIAL

The issue involved in this appeal, which is essentially a simple issue, can be clarified by rephrasing the "Question Presented" as set out at page 2 of the Jurisdictional Statement:

> When a condemning body acquires the underlying fee title to real property through eminent domain proceedings, is it thereby precluded from abandoning proceedings against the leasehold interest?

Appellee has no quarrel with the statement that "a condemnor cannot avoid liability by abandonment of proceedings after the condemnees' right to compensation has become vested." (Juris-

dictional Statement, page 4). Therefore, the question is narrowed to this: did the rights of the parties hereto become reciprocally vested prior to the motion to abandon? If they had vested, then perhaps the Arizona Supreme Court's decision robbed appellants of a property right. If they had not vested, then what property right was affected by the decision of the Arizona Supreme Court?

Appellants contend that a taking of the fee title to land causes all lesser interests to expire, and that when the State of Arizona acquired the fee title to the real property involved, "the leasehold interests in the property also became vested in the State of Arizona." (Jurisdictional Statement, page 4).

This contention is difficult to comprehend, for it flies squarely in the face of Arizona Revised Statutes §12-1126. Title doesn't vest until the judgment is satisfied and the final order of condemnation is recorded. In the case at bar, these conditions precedent were not fulfilled, and therefore title to the leashold interest *had not vested* in the State prior to its motion for abandonment.

The fact that title to the underlying fee had vested in the State is irrelevant. As the Arizona Supreme Court stated in *State v. Helm*, 86 Ariz. 275, 345 P. 2d 202 (not 85 Ariz. 321, 338 P. 2d 787, as erroneously stated at page 2 of appellants' Jurisdictional Statement),

> ". . . the judgment of November 4, 1957, awarded damages to the McJunkins only for their interest in the property. The title to the leasehold interest of appellees was not affected by the judgment awarding the McJunkins damages, nor by the recording of such judgment . . . Since the McJunkins' judgment did not award any damages to appellees, the leasehold interest of appellees did not vest in the State. We therefore hold that appellant may abandon the condemnation proceedings."

The decision of the Arizona Supreme Court followed the general rule that prior to a "taking", the condemnor may discontinue or abandon its eminent domain proceeding. *Danforth v. United States*, 308 U. S. 271, 284. It is uniformly held that there is no "taking" until the condemnor pays or tenders the amount of the final award to the property owner. *South Carolina State Highway*

Department v. Bobotes, 180 S. C. 183, 185 S. E. 165, 121 A. L. R. 1. And even under the view that there is a "taking" when title passes to the condemnor, the rights of appellants had not become vested. Arizona Revised Statutes §12-1126.

To summarize, appellants claim that the granting of the motion to abandon caused an unconstitutional deprivation of one of their property rights. However, upon examination of the Arizona statutes and the opinion of the Arizona Supreme Court in this case, one finds that under Arizona law, appellants did not have any property right in the award of the trial court. The judgment of the trial court had not been paid, it had not ripened into final judgment, and title to the leasehold interest had not vested in the State. Therefore the State had a right to abandon the proceedings, and there was no infringement or impairment of a federal constitutional right.

CONCLUSION

For the reasons stated, appellee urges that this Court should dismiss the appeal. Appellants have failed to comply with the Rules of the Supreme Court in filing their appeal, they have failed to present timely a federal question on the appeal to the Arizona Supreme Court, and the federal question which they allege as a basis for theis appeal is flimsy and unsubstantial.

Respectfully submitted,

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